UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/746,594	12/21/2000	Thomas L. Hill	50-00-004 (014208.1382)	1022

7590 09/20/2004	EXAMINER
Baker Botts L.L.P. 2001 Ross Avenue Dallas, TX 75201-2980	GOLD, AVI M

ART UNIT	PAPER NUMBER
2157	

DATE MAILED: 09/20/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE <u>3</u> MONTH(S) FROM
THE MAILING DATE OF THIS COMMUNICATION.
- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed
  after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
  Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any
  earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on <u>07 June 2004</u>.

2a)☒ This action is **FINAL**.   2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is
   closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) <u>1-20</u> is/are pending in the application.

   4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) <u>1-20</u> is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

   Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

   Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

   a)☐ All   b)☐ Some * c)☐ None of:

   1.☐ Certified copies of the priority documents have been received.

   2.☐ Certified copies of the priority documents have been received in Application No. _____.

   3.☐ Copies of the certified copies of the priority documents have been received in this National Stage
      application from the International Bureau (PCT Rule 17.2(a)).

   * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)

2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
   Paper No(s)/Mail Date <u>7/26/04</u>.

4) ☐ Interview Summary (PTO-413)
   Paper No(s)/Mail Date. _____ .

5) ☐ Notice of Informal Patent Application (PTO-152)

6) ☐ Other: _____.

DETAILED ACTION

The amendment received on June 7, 2003 has been entered and fully

considered.

Response to Amendment

Claim Rejections - 35 USC § 102

1.   The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that

form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

2.   Claims 1-20 are rejected under 35 U.S.C. 102(e) as being anticipated by Lipa et

al., U.S. Patent No. 6,061,722.

Lipa teaches the invention as claimed including a system and method of

automated measurement of computer and network performance characteristics

concurrent with and not interfering with normal network operations (see abstract).

Regarding claim 1, Lipa teaches a Internet based performance measurement

system, comprising:

a server operable to receive performance perception data from a customer

corresponding to a performance query (col. 2, lines 46-63; Lipa discloses a client

sending performance data to a server);

a database comprising a metric corresponding to the performance query, the

metric comprising actual performance data corresponding to the performance query

(col. 7, lines 1-49; Lipa discloses metric performance); and

a performance engine operable to access the performance perception data and

the metric, the performance engine operable to compare the performance perception

data to the metric to determine variations between a customer perception of

performance and actual performance (col. 4, lines 25-45; col. 7, lines 1-49; Lipa

discloses a front-end that measures latency and ping).

Regarding claim 2, Lipa teaches the system of Claim 1, further comprising a

reporting engine operable to generate a report of the variations (col. 7, lines 1-49; col. 8,

lines 4-39; Lipa discloses overall ratings for each zone).

Regarding claim 3, Lipa teaches the system of Claim 1, wherein the performance

data corresponds to a plurality of metrics (col. 7, lines 1-49; Lipa discloses a plurality of

metrics).

Regarding claim 4, Lipa teaches the system of Claim 1, further comprising a

survey generator operable to generate and transmit a communication to the customer

corresponding to the performance query (col. 8, lines 4-39; Lipa discloses additional network performance assessment).

Regarding claim 5, Lipa teaches the system of Claim 4, wherein the survey generator is operable to access customer data to determine a time to generate the communication (col. 8, lines 4-39; Lipa discloses a predetermined amount of time for the assessment to last).

Regarding claim 6, Lipa teaches the system of Claim 4, wherein the survey generator is operable to transmit the communication to a plurality of customer personnel (col. 7, lines 63-67; col. 8, lines 1-24; Lipa discloses multiple users).

Regarding claim 7, Lipa teaches the system of Claim 6, further comprising a reporting engine operable to generate a report of the variations for each of the customer personnel (col. 7, lines 1-49; col. 8, lines 4-39).

Regarding claim 8, Lipa teaches a method for Internet based performance measurement, comprising:

generating a performance query web page having a performance query (col. 2, lines 46-63; Lipa discloses a game-matching area where a user can find out ping times);

receiving performance perception data from a customer corresponding to the performance query (col. 2, lines 46-63);

retrieving a metric corresponding to the performance query, the metric

comprising actual performance data (col. 7, lines 1-49); and

comparing the performance perception data to the metric to determine variations

between a customer perception of performance and actual performance (col. 4, lines

25-45; col. 7, lines 1-49).

Regarding claim 9, Lipa teaches the method of Claim 8, further comprising

generating a performance report of the variations (col. 7, lines 1-4; col. 8, lines 4-39).

Regarding claim 10, Lipa teaches the method of Claim 8, further comprising:

generating a communication corresponding to the performance query web page

(col. 8, lines 4-39); and

transmitting the communication to the customer (col. 8, lines 4-39).

Regarding claim 11, Lipa teaches the method of Claim 10, wherein transmitting

comprises transmitting the communication to a plurality of customer personnel (col. 7,

lines 63-67; col. 8, lines 1-24).

Regarding claim 12, Lipa teaches the method of Claim 11, further comprising

generating a performance report of the variations for each of the plurality of customer

personnel (col. 7, lines 1-49; col. 8, lines 4-39).

Regarding claim 13, Lipa teaches the method of Claim 8, further comprising:

determining a time to generate a communication corresponding to the

performance query from customer data (col. 8, lines 4-39); and

transmitting the communication to the customer at the determined time (col. 8,

lines 4-39; Lipa discloses the end of a predetermined amount of time).

Regarding claim 14, Lipa teaches the method of Claim 8, wherein receiving the

performance perception data further comprises:

identifying one or more of the metrics corresponding to the performance

perception data (col. 7, lines 1-49); and

routing the performance perception data to the corresponding identified metrics

(col. 7, lines 1-49; Lipa discloses pint time comparisons and ratings).

Regarding claim 15, Lipa teaches a method for performance measurement of a

service provider, comprising:

generating a performance metric (col. 4, lines 25-45; col. 7, lines 1-49);

receiving actual performance data corresponding to the performance metric from

the service provider (col. 7, lines 1-49; Lipa discloses overall ratings for each zone);

generating a performance query corresponding to the performance metric (co. 7,

lines 1-49);

receiving performance perception data associated with the performance query

from a customer (col. 7, lines 1-49); and

comparing the performance perception data to the performance metric to determine a difference between customer performance perception and actual service provider performance (col. 7, lines 1-49; col. 8, lines 4-39).

Regarding claim 16, Lipa teaches the method of Claim 15, further comprising transmitting a communication to the customer notifying the customer of the performance query (col. 8, lines 4-39).

Regarding claim 17, Lipa teaches the method of Claim 16, wherein the customer transmits the communication to one or more customer personnel, the customer personnel providing the performance perception data (col. 7, lines 63-67; col. 8, 1-39).

Regarding claim 18, the method of Claim 15, further comprising:

providing access to the performance query via a performance query web page (col. 2, lines 46-63);

generating a communication associated with an Internet address of the web page (col. 2, lines 46-63; Lipa discloses users arranging games); and

transmitting the communication to the customer (col. 2, lines 46-63).

Regarding claim 19, the method of Claim 15, further comprising generating a performance report of the variations (col. 7, lines 1-49; col. 8, lines 4-39).

Regarding claim 20, the method of Claim 15, wherein receiving the performance perception data comprises receiving the performance perception data from a plurality of customer personnel, and further comprising generating and displaying a performance report corresponding to the performance perception data received from each of the plurality of customer personnel (col. 4, lines 25-45; col. 7, lines 1-49; col. 8, lines 4-24).

Response to Arguments

3.   Applicant's arguments filed June 7, 2004 have been fully considered but they are not persuasive.

In response to applicant's argument that the Examiner interpreted "client" to refer to a client computer rather than interpreting it to mean "customer", a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). Lipa discloses a user/customer using the client computers which provide the performance perception data.

Regarding claim 1, Lipa does disclose a client sending performance data to a server (col. 2, lines 46-63). This is shown in more detail where the server receives ping data, for a performance assessment, from the client (col. 9, lines 32-48).

Conclusion

4.   **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

5.   The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

U.S. Pat. No. 6,701,363 to Chiu et al.

U.S. Pat. No. 5,696,701 to Burgess et al.

U.S. Pat. No. 5,949,976 to Chappelle.

U.S. Pat. No. 6,438,592 to Killian.

U.S. Pat. No. 6,556,974 to D'Alessandro.

U.S. Pat. No. 5,796,633 to Burgess et al.

U.S. Pat. No. 6,021,439 to Turek et al.

U.S. Pat. No. 6,304,904 to Sathyanarayan et al.

U.S. Pat. No. 6,513,065 to Hafez et al.

U.S. Pat. No. 6,349,325 to Newcombe et al.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Avi Gold whose telephone number is 703-305-8762. The examiner can normally be reached on M-F 8:00-5:30 (1st Friday Off).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ario Etienne can be reached on 703-308-7562. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Avi Gold

Patent Examiner

Art Unit 2157

AMG

SALEH NAJJAR
PRIMARY EXAMINER